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No. 71-376

IN THE

Supreme Court of the United States

October Term, 1971

KINNEAR-WEED CORPORATION, *Petitioner,*

v.

HUMBLE OIL AND REFINING COMPANY,
A Texas Corporation (now dissolved and merged into
Standard Oil Company, a New Jersey Corporation)
its successor and/or surviving corporation
and its assigns,

Respondent

REPLY BRIEF OF PETITIONER

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To The Honorable Supreme Court of The United States, and to the Honorable Justices of Said Court:

Petitioner in reply to RESPONDENT'S BRIEF IN OPPOSITION here will clarify erroneous and misleading statements made by respondent with respect to the Petition For Writ of Certiorari filed herein by Petitioner. Findings of Fact and Conclusions of law of the District Court below in 68-H-40 is printed in APPENDIX of Record in Vol. III at pages 819-855.

QUESTIONS PRESENTED

Question I finds credence for its source from the PETI-

TION OF PETITIONER-APPELLANT being the original pleading to institute this Independent Action in the Court of Appeals below, printed in the APPENDIX C-2 hereto, at page 152 (10) and page 160, Petitioner alleging denial of jury demand twice. The latter time written jury demand was made was on Jan. 14, 1955 after having filed on Jan. 14, 1955 AMENDED COMPLAINT and served same on Respondent on that date. Written jury demand was made within 10 days from the serving of the last pleading as provided by 28 U.S.C., Federal Rules of Civil Procedure, Rule 38, printed in APPENDIX A-3 hereto, infra p. 91. Which jury demand was denied by the trial Judge Lamar Cecil on Jan. 17, 1955 in open court, although there were several law issues of fact (no issues in equity) triable by jury in said Amended Complaint such as Patent Infringement, Unfair Competition, Unjust Enrichment and Violation of Texas and Federal Anti-trust Laws properly plead in said amended complaint. Yet, Respondent says "Question I is clearly beyond the scope of this proceeding, not having been referred by the Court of Appeals in its en banc opinion to the District Court for trial and not having been briefed or urged either in the District Court or the Court of Appeals". See page 2 of Respondent's Brief. Written "jury demand" appears in BRIEF FOR APPELLANT in the Court of Appeals below at page 8, 35, and, on pages 5, 16, and 23 of REPLY BRIEF OF APPELLANT. In the Court of Appeals below at each of such pages Petitioner strenuously argued on the point of timely jury demand having been denied which is the basis upon which QUESTION I is presented before the Supreme Court. It is evident that Petitioner is entitled to argue the "jury demand" Question I under the 7th Amendment to U. S. Constitution and 28 U.S.C., Rule 38, FRCP.

QUESTIONS II, X, XI, XII, XIV and XV find their basis on "due process of law" in the PETITION OF PETITIONER-APPELLANT the original pleading upon which this case was presented to the Court of Appeals below, having been ordered filed on May 18, 1967 by the Court of Appeals below. Said PETITION is printed in APPENDIX C-2 hereto and "due process" alleged at pages 146 and twice at page 175. These questions were argued on pages 35, 39 of BRIEF OF APPELLANT in the Court of Appeals below and on pages 5, 6, 17, 18, 19 and 23 of REPLY BRIEF OF APPELLANT filed in the Court of Appeals below. Therefore, the "due process of law" clause of the 5th Amendment to U. S. Constitution is properly presented to the Supreme Court.

QUESTIONS II, III, IV, V, VI, VII, VIII, IX and XIII relate to 28 U.S.C. 455.

QUESTIONS XIV and XV as to fraudulent Exhibit D-31 (here Pltf. Ex. 110) finds basis in original pleading in PETITION OF PETITIONER-APPELLANT ordered filed by the Court of Appeals below on May 18, 1967, printed in the APPENDIX C-2 hereto, and alleged at pages 146, 171 and 172. The fraudulent bit exhibit D-31 was argued in the Court of Appeals below having been referred to in BRIEF FOR APPELLANT on pages 8, 36-37, and 54-59.

QUESTION XVI is the Newly Discovered Evidence question which evidence was discovered by Counsel for Petitioner on the 13th day of June, 1971 after the argument had been heard in the Court of Appeals on appeal from the District Court judgment and opinion rendered April 26, 1971 and ruling denying Rehearing dated June 17, 1971. The Motion and Supplemental Petition For Re-

hearing on Newly Discovered Evidence on D-31 was filed on June 16, 1971 and Appellant's Motion for Leave to File Supplemental Petition For Rehearing was denied by Order of the Court of Appeals on June 25, 1971.

It is a fact that all of the Questions Presented I through XV have clear basis for their presentment to the Supreme Court since the source of such questions arise from original allegations in the PETITION OF PETITIONER-APPELLANT filed as an Independent Action as an exception to, or, by reason of the saving clause of Rule 60 (b) of the Federal Rules of Civil Procedure in the Court of Appeals below and ordered filed by that court on May 18, 1967.

QUESTION XVI however, is based upon newly discovered evidence presented within 3 days from date of discovery by Counsel for Petitioner and denied June 25, 1971 by order of the Court of Appeals below. The Supreme Court should direct the Petitioner to file another Independent Action thereon in the U. S. District Court For the Eastern District of Texas, Beaumont Division. This newly discovered evidence shows that D-31 is a spurious fraudulent bit as per Affidavit of Eddie R. Kehrer an unbiased witness who is not controlled by Respondent or Hughes Tool Co., although a former Hughes Tool Co. employee from 1910-1918. Mr. Kehrer is the retired head of all machine operations of Mobil Oil Co. oil refinery since 1957 and is acclaimed by all to be a highly respected credible person and a peerless master in the machine art practice. He was head of the Tool and Die Department first of Sharp-Hughes tool Co., from 1910-1916 and its successor in business Hughes Tool Co. from 1916-1918 having to do with making all of the new 2 and 3 cone bits for those organizations and is in position to give the Courts the true

facts about Hughes organizations activities of their manufacture of the 2 and 3 cone bits manufactured by Hughes Organizations. He says in his affidavit that he made 2 and 3 cone bits for the Hughes organizations first as machinist for Houston Car Wheel Co. in the year 1909, and, thereafter as an employee of the Hughes organizations from June 1910 through November 1918. That he made such bits from drawings made for Howard R. Hughes Sr., now deceased, the head of said Hughes organizations and that all Hughes 2 and 3 cone bits were made where the water or drilling mud pumped through the water courses of said 2 and 3 cone bits would discharge on top of the cones and not like the 3 cone bit D-31. D-31 shows the water pumped through the water courses to miss the cones and hit on the bottom of the hole as is done by "jet bits" such as the Kinnear invention on same and for which the Patent Office awarded claims to new subject-matter in the Kinnear invention by grant of claims claiming such arrangements. The Brown & Sharpe Mfg. Co. drawings of Providence, R. I. made for Howard R. Hughes organization on Jan. 6, 1909 shown between pages 138 and 139 of the Petition For Writ of Certiorari herein was attached to the Kehrer Affidavit as Exhibit A-2 and from which he says he made the 3 cone bits for the Hughes organizations. This engineering machine shop drawing shows unequivocally that the water discharged through the 3 water courses 17 as well as the Hughes patent thereon as A-1 between pages 138-139 and discharges upon the respective 3 cones of that bit. This shows D-31 is a newly fabricated bit for the purpose of introduction into evidence by Respondent in Kinnear-Weed-Humble suit C. A. No. 2363 and D-31 was defended by Respondent and its attorneys as an authentic and genuine bit in C. A. 68-H-40 in the District Court below. Humble had access to said drawings through

arrangements of Garret R. Tucker, Jr. Counsel of Respondent with Mr. L. L. Payne of Hughes Tool Co., prior to the trial of 68-H-40 in June of 1969. Mr. Tucker arranged for his Expert Witness Wiley Noble whose deposition testimony, Pltfs. Ex. No. 143 at pages 108-126 recits such facts. Also the Wiley Noble Deposition a part of the record in this case conclusively states that in his opinion that the Brown & Sharpe Mfg. Co. engineering drawings he viewed at Hughes Tool Company about a month before the trial of 68-H-40 before Judge Connally that the water or drilling mud to be discharged through the 3 water course of the said drawings would strike or *hit upon the cones.* D-31 shows the water discharged through its water courses *to miss the cones* and hit upon the bottom of the well hole and misses the cone altogether as in present day "jet bits". This proves that Hughes organizations did not make 3 cone bits like D-31 back in the 1910-12 era as now claimed by Humble and its attorneys and Hughes witnesses in Humble case. This mysterious 3 cone bit D-31 is a phoney and fraud being practiced upon the federal courts and upon Petitioner. Please will the Supreme Court recognize the Kehrer Affidavit as the truth, which it is, and give credence to the Brown & Sharpe Mfg. Co. drawing viewed by Humble's Expert Witness Wiley Noble at Hughes Tool Co. and attached to the Kehrer Affidavit as the way he made 3 cones bits for Hughes, first in 1909 while a machinist for Houston Car Wheel Co., and, thereafter while making same for Hughes later in the 1910-12 era while he was head of Tool and Die Department for Hughes organization. Mr. Tucker Counsel for Humble had knowledge of the Brown & Sharpe Mfg. Co., drawings as he made the arrangements for his expert witness Wiley Noble to study the drawings at Hughes Tool Co., in May 1969 at behest of L. L. Payne Hughes retired Chief Engineer and Vice-President of En-

gineering but still on duty in consulting capacity for Hughes. Mr. Tucker Counsel for Respondent defended D-31 as an authentic and genuine bit in June 1969 in C. A. No. 68-H-40 knowing full well from the Brown Sharpe Mfg. Co. engineering machine shop drawings and the testimony of Mr. Floyd L. Scott of Hughes which he introduced as Defts. Exs. Nos. 2A and 2B that the 3 cone bit D-31 of Hughes was made from said Brown & Sharpe Mfg. Co. drawings. See Scott testimony R. p. 2494 from Tucker's witness Scott in C. A. No. 2363, which is quoted and printed at page 190 of the APPENDIX to the Petition For Writ of Certiorari in 71-376 now before the Supreme Court. The attorney Garret R. Tucker, Jr. for Respondent, his client Respondent and these Hughes Tool Co. engineers and witnesses of Respondent have ganged together in a conspiracy to practice fraud and has practiced fraud by introducing D-31 as a prior art bit and defended same as genuine bit in 68-H-40 upon all of the Federal Courts involved in this litigation from the beginning of C. A. No. 2363 in the original suit in the District Court For the Eastern District of Texas on down the line in every proceeding thereafter. They have practiced perjury and subornation of perjury upon all of said federal courts, involved and upon Petitioner and should be severely punished for such high crimes to induce the Federal Courts to render fraudulently begotten judgments against Petitioner and should be made to respond in damages to Petitioner for all of the abortive trials beginning in Feb. 28, 1955 with trial of C. A. No. 2363 down to the present time.

Mr. Tucker, Counsel for Respondent will not dare dispute any of the facts set forth above regarding D-31 and he is guilty of defending D-31 as genuine and authentic bit exhibit in C. A. 68-H-40 in the District Court below

before Judge Connally knowing that D-31 was a fraudulent bit exhibit. And, the reason for requesting the direction of the Supreme Court granting Petitioner right to file another Independent Action on D-31 is that the District Court below in 68-H-40 has without legal right issued injunction restraining Petitioner and its officers, agents and attorneys from filing or presenting D-31 in any court, regardless of the circumstances. The Court of Appeals below has upheld said District Court below on appeal in Appeal No. 29,103 on said injunction. Said injunction restrains Petitioner from filing a new Independent Action on D-31 or Petitioner would have already filed such an action. That is why Petitioner asks the Supreme Court for redress from said restraining injunction. Said injunction was wrongfully issued by the District Court in 68-H-40, and affirmed by the Court of Appeals below in Appeal No. 29,103, and should not stand because Respondent has no pleading alleging Petitioner is guilty of asserting charge fraudulently on D-31 nor was any evidence or proof of fraud introduced against Petitioner in the record in the District Court below upon which to issue an injunction against Petitioner and its officers, agents and attorneys, and, award damages to Respondent against Petitioner thereon. Said injunction is not supported by pleadings or evidence and should be reversed and the damages awarded thereon should be reversed by the Supreme Court because there is no basis for same in law.

CONSTITUTION AND STATUTES INVOLVED

The 7th Amendment to the U. S. Constitution and Statute 28 U.S.C., Rule 38 of the Federal Rules of Civil Procedure relate to the "right of trial by jury" of fact issues or claims plead in the original pleadings of PETITION

OF PETITIONER-APPELLANT in APPENDIX C-2 as stated above. Said Constitutional and Statutory provision are important questions of federal law which both District Courts and Court of Appeals below have disregarded, which has denied Petitioner "right of trial by jury" timely demanded and has denied Petitioner "due process of law" under the 5th Amendment to U. S. Constitution, and, for these reasons certiorari should be granted and new trial granted in this case.

The QUESTIONS PRESENTED II, III, IV, V, VI, VII, VIII, IX and XIII as the same relate to disqualification of Judge Lamar Cecil under "due process of law" clause of the 5th Amendment to the U. S. Constitution *are new legal questions* and *are of great public importance* that calls for review by the Supreme Court and *for interpretation of rules of law* involved in said questions.

The QUESTIONS PRESENTED II, X, XI, XII, XIV, XV and XVI as the same relate to fraud and conspiracy to practice fraud by Judge Lamar Cecil with Respondent upon all Federal Courts involved is in violation of the "due process of law" clause of the 5th Amendment to the U. S. Constitution and *is of instant public importance* since *such questions involve the integrity of the Federal Courts,* as well as, Petitioner.

The 5th Amendment to the U. S. Constitution applies to QUESTIONS PRESENTED II, X, XI, XII, XIV and XV, which were presented for review by the Court of Appeals below as issues on appeal Nos. 1, 8 and 10 insofar as said 5th Amendment relates to "due process of law", as a constitutional guarantee which complements 28 U. S. C. 455. In event said 28 U.S.C. 455 is void as being indefinite and uncertain as to meaning only as to the "substantial interest" clause thereof, which Petitioner believes to be void.

Then the "due process of law" clause of the 5th Amendment to the U. S. Constitution also applies to said questions, and, in accordance with Petitioner's argument on pages 87a, 87b, 87c, and 87d will control. Said pages 87a, 87b, 87c and 87d were attached in accordance with Long Distance Phone call by Counsel William E. Kinnear to the office of the Clerk of the U. S. Supreme Court on September 14, 1971 to correct printer's error in the Petition for Writ of Certiorari within the time for the filing of said petition. The petition was mailed direct to the clerk's office by the printer without conusel having benefit of viewing same. The correction can be, and was timely granted by the Clerk.

On page 4 of RESPONDENT'S BRIEF IN OPPOSITION the Respondent is using sharpshooter tactics in regard to the Questions Presented on Ex. D-31 (Pltfs. Ex. No. 110 this record). No wonder Respondent wants to cast this issue aside by some frivolous remark that this issue is not in the case. To the contrary, reference is made to remarks by Respondent's Counsel Mr. Tucker, and of the COURT on the issue of D-31. (Tr. of Record Page 752, lines 14-17):

"MR. TUCKER: "——And I think it is squarely before this court to determine the authenticity and genuineness of that exhibit D-31."

Tr. of Record Page 752, lines 18-21:

"THE COURT: Well, I have said all I am going to. Each of you is trying to get me to commit myself to what findings I am going to make."

Tr. of Record Pages 752 lines 24-25 and continued on page 753 lines 1-3:

"All I can say is that *I will hear anything you want to offer* and *will make findings* when I get through *on whatever*

issues are before me, and I will not rule off the top of my hat.

Tr. of Record page 754 lines 3 and 4 continued:

"THE COURT: I have said all I can say. Who would you like to call next?"

Thereafter, Petitioner introduced the deposition testimony of Respondent's Expert witness Wiley Noble as Pltfs. Ex. No. 143 from which Petitioner quotes in proving up that D-31 is a phoney and fraudulent bit. Also the deposition testimony of E. L. Rosenberg, another expert witness of Respondent. Thereafter, Mr. Tucker Counsel for Respondent introduced the deposition testimony bearing on D-31 of Floyd L. Scott Engineer of Hughes Tool Co., Defts. Ex. Nos. 2A and 2B; Lyle L. Payne another Engineer of Hughes Tool Co., Defts. Ex. Nos. 3, 4 and 5; and, Deposition testimony of C. W. Kinnear, Defts. Ex. No. 12, all of which bear upon the authenticity and genuineness of D-31 and from which Petitioner has argued in Brief of Appellant on D-31, and, has quoted profusely in PETITION FOR REHEARING and in SUPPLEMENTAL PETITION FOR REHEARING to demonstrate that D-31 is a fraudulent bit exhibit. So, when Mr. Tucker, Counsel of Respondent in paragraph 2 of his June 24, 1971 Response to said Petitions for Rehearing says that D-31 was "expressly abandoned", it is a clear misrepresentation intended to mislead the Court of Appeals also on page 2 of its brief before the Supreme Court by innuendo is trying to mislead this court that the issue of D-31 has been withdrawn from this case. The trial Judge Connally in 68-H-40 made no such finding of fact or conclusion of law as to D-31 being withdrawn from the case.

The Questions presented to the Supreme Court are based

upon questions of law and Rule 52 (a) of the Federal Rules of Civil Procedure have no bearing upon this case as referred to by Respondent on page 6 of its brief.

The Supreme Court Rule 19 has been complied with point by point as set out above which destroys any defense made against the Petition For the Writ by Respondent, and, Certiorari should be granted.

Respectfully submitted,

Fred Parks,

W. Frank Stickle, Jr., and
Hanson, O'Brien, Birney & Stickle

William E. Kinnear

Counsel for Petitioner
Kinnear-Weed Corporation

PROOF OF SERVICE

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of October, 1971, I served copies of the foregoing REPLY BRIEF OF PETITIONER, by mailing the required copies in duly addressed envelopes by U. S. Mail, postage prepaid to: Mr. Garrett R. Tucker, Jr., Esq., One Shell Plaza, Houston, Texas 77002, and Mr. C. O. Ryan, Esq., Gulf Building, Houston, Texas 77002, Counsel for Respondent.

William E. Kinnear
Counsel for Petitioner,
Kinnear-Weed Corporation